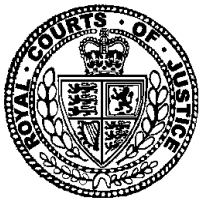

Neutral Citation Number: [2021] EWHC 892 (Admin)

Case No: CO/2027/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/04/2021

Before:

THE LORD CHIEF JUSTICE & MR JUSTICE SWIFT

- -

Between

THE QUEEN

on the application of

OMAR LATIF **Claimant**

-and-

SECRETARY OF STATE FOR JUSTICE **Defendant**

- -
- -

Dan Squires QC & Anita Davies (instructed by **Birnberg Peirce LLP**) for the **Claimant**
Neil Sheldon QC, Melanie Cumberland & Ben Tankel (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 3rd and 4th February 2021

- -

APPROVED JUDGMENT

Covid 19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts Tribunals Judiciary website. The date and time for hand down is deemed to be 10:00am 14 April 2021.

MR JUSTICE SWIFT:

A. Introduction

1. In June 2018 the Claimant was released from prison on licence pursuant to the provisions of Chapter 6 of Part 12 of the Criminal Justice Act 2003 ("the 2003 Act"). In December 2019 the Secretary of State for Justice varied the conditions contained in that licence. The Claimant's case is that the decision to vary the licence conditions was unlawful for any or all of five reasons. *First*, the Claimant submits that the provisions of the 2003 Act required any such decision to be either taken or approved by the Parole Board. He submits this is so either because that is the effect of the provisions of Chapter 6 of Part 12 of the 2003 Act ordinarily construed or if necessary, that those provisions are to be so construed by reason of the interpretive obligation at section 3 of the Human Rights Act 1998 to give effect to his Convention rights. *Second*, the Claimant contends that the imposition of new licence conditions had an adverse impact on him and as a result he should have been given an opportunity to make representations before they were imposed. He submits that the decision to impose them was not taken in circumstances which precluded the usual application of the duty to allow representations. *Third*, the Claimant submits that the decision to vary the licence conditions was invalid because, contrary to the Secretary of State's policy, the decision was not initiated by the Claimant's Offender Manager. *Fourth*, he submits that one of the conditions added to the licence was unlawful because it was insufficiently certain. *Fifth*, he contends that it is a disproportionate interference with his Convention rights for that same condition to remain in force.

B. Facts

(1) The Claimant: conviction, release, recall, release.

2. In 2012 the Claimant pleaded guilty to an offence of engaging in conduct in preparation for acts of terrorism contrary to section 5(1) of the Terrorism Act 2006. He admitted that he had attended meetings in November and December 2010 with the intention of assisting others to commit an act of terrorism.

3. The Claimant was one of nine defendants sentenced by Mr Justice Wilkie on 9 February 2012. Usman Khan was one of the others. The sentence passed on the Claimant was an extended sentence of 15 years 4 months comprising a custodial period of 10 years 4 months and an extended licence period of 4 years. That sentence was imposed pursuant to section 227 of the 2003 Act. At the material time, the material parts of that section were in the following terms.

> "**227 Extended sentence for certain violent or sexual offences: persons 18 or over**
>
> (1) This section applies where—
>
> (a) a person aged 18 or over is convicted of a specified offence committed after the commencement of this section, and

> (b) the court considers that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences, but
>
> (c) the court is not required by section 225(2) to impose a sentence of imprisonment for life or, in the case of a person aged at least 18 but under 21, a sentence of custody for life.
>
> (2) The court may impose on the offender an extended sentence of imprisonment or, in the case of a person aged at least 18 but under 21, an extended sentence of detention in a young offender institution, if the condition in subsection (2A) or the condition in subsection (2B) is met.
>
> …
>
> (2B) The condition in this subsection is that, if the court were to impose an extended sentence of imprisonment or, in the case of an offender aged at least 18 but under 21, an extended sentence of detention in a young offender institution, the term that it would specify as the appropriate custodial term would be at least 4 years.
>
> (2C) An extended sentence of imprisonment or, in the case of an offender aged at least 18 but under 21, an extended sentence of detention in a young offender institution is a sentence of imprisonment or detention in a young offender institution the term of which is equal to the aggregate of—
>
> (a) the appropriate custodial term, and
>
> (b) a further period ("the extension period") for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by him of further specified offences"

4. On 25 February 2016 the Claimant was released on licence, as required by section 247 of the 2003 Act. The material part of that section, at that time, provided:

> "**247 Release on licence of prisoner serving extended sentence under section 227 or 228**
>
> (1) This section applies to a prisoner who is serving an extended sentence imposed under section 227 or 228.
>
> (2) As soon as—

> (a) a prisoner to whom this section applies has served the requisite custodial period,
>
> … it is the duty of the Secretary of State to release him on licence.
>
> …
>
> (7) In this section—
>
> *"the appropriate custodial term"* means the period determined by the court as the appropriate custodial term under section 227 or 228;
>
> *"the requisite custodial period"* means—
>
> (a) in relation to a person serving one sentence, one half of the appropriate custodial term, and
>
> (b) in relation to a person serving two or more concurrent or consecutive sentences, the period determined under sections 263(2) and 264(2)."

5. The conditions in the licence were set in accordance with section 250 of the 2003 Act. At the material time, section 250 was in these terms[1]:

> "**250 Licence conditions**
>
> (1) In this section—
>
> (a) *"the standard conditions"* means such conditions as may be prescribed for the purposes of this section as standard conditions, and
>
> (b) *"prescribed"* means prescribed by the Secretary of State by order.
>
> …
>
> (4) Any licence under this Chapter in respect of a prisoner serving a sentence of imprisonment (including a sentence imposed under section 226A, 227 or 236A) or any sentence of detention under section 91 or 96 of the Sentencing Act or section 226A, 226B, 227, 228 or 236A of this Act—
>
> (a) must include the standard conditions, and

[1] Section 250 was in this form from 13 April 2015 until 25 February 2020.

(b) may include—

(i) any condition authorised by section 62, 64 or 64A of the Criminal Justice and Court Services Act 2000 or section 28 of the Offender Management Act 2007, and

(ii) such other conditions of a kind prescribed by the Secretary of State for the purposes of this paragraph as the Secretary of State may for the time being specify in the licence.

(5) A licence under section 246 must also include a curfew condition complying with section 253.

(5A) Subsection (5B) applies to a licence granted, either on initial release or after recall to prison, to—

(a) a prisoner serving an extended sentence imposed under section 226A or 226B, other than a sentence that meets the conditions in section 246A(2) (release without direction of the Board), or

(b) a prisoner serving a sentence imposed under section 236A.

(5B) The Secretary of State must not—

(a) include a condition referred to in subsection (4)(b)(ii) in the licence, either on release or subsequently, or

(b) vary or cancel any such condition included in the licence,

unless the Board directs the Secretary of State to do so.

…

(8) In exercising his powers to prescribe standard conditions or the other conditions referred to in subsection (4)(b)(ii), the Secretary of State must have regard to the following purposes of the supervision of offenders while on licence under this Chapter—

(a) the protection of the public,

(b) the prevention of re-offending, and

(c) securing the successful re-integration of the prisoner into the community."

The standard licence conditions are set out at paragraphs 3-5 of the Criminal Justice (Sentencing) (Licence Conditions) Order 2015 ("the 2015 Order"). Article 7 of the 2015

Order identifies the types of matter that may be included in a licence as prescribed conditions.

> "**7. — Other types of licence conditions**
>
> (1) The conditions in paragraph (2) are the kinds of condition that may be included in an offender's licence in accordance with section 250(4)(b)(ii) of the Act.
>
> (2) A condition concerning–
>
> (a) residence at a specified place;
>
> (b) restriction of residency;
>
> (c) making or maintaining contact with a person;
>
> (d) participation in, or co-operation with, a programme or set of activities;
>
> (e) possession, ownership, control or inspection of specified items or documents;
>
> (f) disclosure of information;
>
> (g) a curfew arrangement;
>
> (h) freedom of movement;
>
> (i) supervision in the community by the supervising officer, or other responsible officer, or organisation;
>
> (j) restriction of specified conduct or specified acts.
>
> (3) For the purpose of this article, *"curfew arrangement"* means an arrangement under which an offender is required to remain at a specified place for a specified period of time which is not an arrangement contained in a curfew condition imposed by virtue of section 250(5) of the Act."

6. On 2 September 2016 the Claimant's licence was revoked and he was recalled to prison by the Secretary of State pursuant to the power at section 254 of the 2003 Act. It was alleged he had deliberately damaged the electronic tag he was required to wear under the terms of his licence. When a person is recalled to prison pursuant to section 254, the 2003 Act provides a process for review by the Secretary of State (section 255A) and, if the Secretary of State decides that the recalled person is not suitable for automatic release (pursuant to section 255B), for the person to be dealt with under section 255C, which provides for release on licence by the Secretary of State or referral

to the Parole Board. The recalled prisoner may make representations to the Parole Board which then decides whether release should occur. The question for the Board is whether it is necessary for public protection that the recalled person remain in prison. If the Parole Board directs that the recalled person should be immediately released on licence the Secretary of State "must give effect to the direction" (section 255C(5)).

7. The Parole Board was not able to decide whether the Claimant had deliberately damaged the electronic tag. The Board accepted the Probation Service's assessment that the risk of serious harm presented by the Claimant was "high", but taking account of the Risk Management Plan and Supervision Plan proposed by the Probation Service concluded it was no longer necessary for the Claimant to remain in prison for reasons of public protection. He was released on 1 June 2018. Following release, the Claimant's case was allocated to the National Probation Service in Wales and the Probation Delivery Unit covering the Cardiff and Vale of Glamorgan area ("the Cardiff office").

8. Every prisoner released on licence is allocated to a specific Offender Manager, the person responsible within the probation system for that offender. (The Offender Manager is also referred to as the Supervising Officer.) The Offender Manager assesses and then periodically reassesses each offender using the Offender Assessment System ("the OASys assessment"). OASys assessment is used by the Offender Manager to devise Risk Management Plans and Supervision Plans. The former is the plan devised to manage the risk of harm presented by the offender when on licence, and includes the licence conditions applied to the offender. The Supervision Plan sets out the steps that will be taken by HM Prison & Probation Service ("the Probation Service") to prevent further criminal behaviour. Each Offender Manager reports to a Senior Probation Officer.

9. It is widely recognised that for offenders like the Claimant who have been convicted of terrorism offences ("TACT offenders"), identifying and assessing risk is a particularly difficult exercise. Extremist views and ideologies may not be articulated; factors that in many other contexts are considered stabilising and contribute to a reduction in risk, such as a settled family life, will not always have that effect. All this being so, TACT offenders are a class for which risk assessment is not the sole responsibility of the Offender Manager. Specialist counter-terrorism staff in the Probation Service work alongside Offender Managers day-to-day, providing advice, assistance and support. Further, every TACT offender's risk assessment is periodically reviewed at Multi Agency Public Protection Arrangements (MAPPA) meetings. MAPPA is a process through which various agencies including the Police and the Probation Service, and specialist counter-terrorism staff work in concert to assess and manage the risks posed by the most serious classes of offender. MAPPA operates at three levels. Level 3 MAPPA meetings (the highest level) involve senior members of the relevant agencies and are convened when it is considered a high or very high risk of serious harm needs to be addressed.

(2) Fishmongers' Hall

10. On Friday 29 November 2019 Usman Khan killed two people while attending a prisoner rehabilitation conference at Fishmongers' Hall near London Bridge. Khan had been a co-defendant of the Claimant. He had pleaded guilty to an offence contrary to section 5 of the Terrorism Act 2006. Khan received a sentence of detention for public protection for an indefinite period with a minimum term of 8 years. On appeal a determinate

sentence was substituted: an extended sentence of 21 years and comprising a custodial term of 16 years and a 5-year extension period.

11. Al Reid has leading responsibility for national security matters with the Probation Service. In his statement for these proceedings he explained that prior to 29 November 2019 the indications had been that Khan, who had been released on licence in 2018, was "progressing well". For example, Khan had been permitted to travel to London on his own to attend the 29 November 2019 conference. Mr Reid stated that no one in the Probation Service responsible for Khan's management on licence had foreseen that someone like Khan, who appeared to be progressing well following release on licence, might prepare for and commit a terrorist attack. Thus, there was concern that the progress of other TACT offenders on licence might not be as successful as had been assumed. Also, there was the fear that copy-cat attacks might follow the Fishmongers' Hall attack. Copy-cat attacks following a high-profile incident are a known phenomenon; that the Claimant had been one of Khan's co-defendants was an additional matter giving rise to concern about whether and how he might react to what had taken place.

(3) Events affecting the Claimant: 13 November 2019 to 13 December 2019

12. Mr Reid's evidence explained the response of the Probation Service at national level to the events at Fishmongers' Hall. Each regional office was required to provide information on all TACT offenders in its area by completing a pro-forma question sheet. The sheet for the Claimant was completed and returned on 30 November 2019.

13. There is an issue whether the Probation Service at national level required that certain licence conditions be applied to TACT offenders. A draft of a licence variation request form relating to the Claimant, completed on 30 November 2019 by Amaladipa Remigio (the Head of Public Protection at the Cardiff office), requested two additional licence conditions ("that [the Claimant] not attend events with more than one hundred attendees", and he "not enter London"), and stated that these were "Additional Licence Conditions requested by the Secretary of State". On the morning of Sunday 1 December 2019, Jill Packham the counter-terrorism lead at the Cardiff office sent an email to the Offender Managers responsible for TACT offenders saying she wanted to meet the following day "to discuss the new reporting requirements, licence conditions and how we will manage them". Further, in the evening of 2 December 2019 Mr Reid sent a document to the counter-terrorism specialist staff at each regional office (including to Miss Remigio in Cardiff) described as a "script". This included the following.

> "**1 (Key points to action – target for completion cop Wednesday 4 December:**
>
> All offenders to be seen either in the office or home visit by close of play Wednesday 4 December 2019.
>
> Check on the welfare of individual, any concerns?
>
> Instigate weekly reporting.

> Deploy GPS tag, explain rational about heightened risk. Any exceptions to come via NPS Central NS Team (KV/AR).
>
> Add licence conditions regarding – for those outside London; not travel to London.
>
> Also, not to enter regionally identified crowded places with examples (e.g. Manchester Arena, Birmingham Bullring, named concert venues, shopping centres and sports grounds).
>
> • Not enter the areas of London as defined by the boundaries of the City of London, City of Westminster and London Borough of Southwark (as set out on the attached map), without permission of the NPS Divisional Head of Public Protection.
>
> • Not to attend or organise any meetings or gatherings of more than 50 people and not to enter any area or place listed in the attached document, without permission of NPS Divisional Head of Public Protection.
>
> Any deviations or permission allowing people to enter areas must come from Heads of Public Protection or National Security Leads.
>
> Update Delius and OASys.
>
> **To update centre on progress close Wednesday 4 December and Friday 6 December**."

14. Mr Reid's evidence was that this "script" did not mean that responsibility had been removed from the regional offices and claimed at national level; he said the script was in the nature of a timetable within which regional offices had to take their own decisions on all relevant TACT offenders.

15. First thing on Tuesday 3 December 2019 both Ms Remigio and Ms Packham sent emails to the Heads of the Cardiff Office referring to the script document. Ms Remigio's email, referring to the passage from the script document set out above, said that "the licence condition has now changed again" asking the Heads of the Cardiff Office to "action this change today". Ms Packham's email was to the same effect that "the centre has revised the licence conditions".

16. On Wednesday 4 December 2019 the following occurred: a MAPPA meeting was held to consider the Claimant's case; Ms Packham and Salli Dixon (the Claimant's Offender Manager) spoke to the Claimant by phone; and they then met him at Cardiff police station. The MAPPA meeting took place first. The meeting was a Level 3 meeting, reflecting the importance of the situation. Those attending included Ms Packham, Ms Dixon and Hannah Williams (Head of the Cardiff office). The meeting concluded that the risk of harm presented by the Claimant remained in the "high" category (the second of four categories open for consideration). A decision was taken to impose three

additional licence conditions and to reinstate a requirement that the Claimant wear an electronic tag. The conditions were recorded in the minutes of the meeting as not to enter "regionally identified crowded places"; not, without permission, to enter any of the City of London, the City of Westminster, or the London Borough of Southwark; and not, without permission, "to attend or organise any meetings or gatherings of more than 50 people and not to enter any area or place listed in the attached document".

17. At 3:30pm Ms Packham and Ms Dixon spoke to the Claimant on the phone. They explained the three new licence conditions to him and told him that he would be required to wear an electronic tag. The note of the phone call made by Ms Dixon includes the following.

> "Jill and myself phoned [the Claimant] in place of visit … Jill reassured [the Claimant] he is not being recalled. We then went over the three additional licence conditions (Not to enter defined London areas, Not to enter crowded places, Not to enter gatherings of more than 50 people). [The Claimant] was accepting but did have questions such as weddings? Supermarkets? Jill advised [the Claimant] run any queries by me, we will have to access on an individual basis. Jill advised [the Claimant] think in terms of ticketed events – if it needs a ticket, he needs to ask, such as …football matches etc. Supermarkets are fine as long as outside of town. Gill advised [the Claimant] just stay out of [the City Centre] for now."

18. At 5pm Ms Packham and Ms Dixon met the Claimant at Cardiff police station. The Claimant signed a new licence document which included the three conditions above. Neil Sheldon QC, for the Secretary of State, accepted that the licence document signed by the Claimant on 4 December 2019 was not legally valid so far as it purported to impose the three new licence conditions. The Secretary of State's policy is that conditions such as those in this case can only be applied to an offender with the consent of the Secretary of State. Ms Packham and Ms Dixon believed that the necessary consent had been obtained. They were under the impression that the licence variation request form completed by Ms Remigio on 30 November 2019 had been submitted for the Secretary of State's approval. In fact, it had not. Ms Remigio had prepared the document and sent it to Ms Packham and others for their consideration. Ms Packham misunderstood that message with the consequence that the variation request document had not been submitted for the Secretary of State's approval. However, as at 4 December 2019, none of this was realised. The Claimant (and everyone else in the Cardiff office) believed the new licence conditions applied to him.

19. By 12 December 2019 Ms Williams had realised the error. On that day she completed and submitted a new licence variation request form in Salli Dixon's name. On 13 December 2019 approval was given for two new licence conditions: not without permission, "to attend or organise any meetings or gatherings of more than 50 people"; and not, without permission, to enter the City of London, the City of Westminster, or the London Borough of Southwark (conditions xvi and xvii in the new document). The "crowded places" condition had been dropped. The Claimant was given a copy of this second new licence on 13 December 2019. It does not appear he was told about the

error concerning the licence he had signed on 4 December 2019. Nor does it appear that Ms Dixon realised that the 13 December 2019 version of the licence did not contain the "crowded places" condition. The Probation Service's note (recorded on its "Delius" system) shows that this point did not dawn on Ms Dixon until 13 February 2020 when Ms Packham pointed it out when responding to Ms Dixon's request that the Claimant have permission to go to Cardiff city centre.

C. Decision

20. The Claim Form contained seven grounds of challenge. Permission to apply for judicial review was granted by Andrew Baker J on Grounds 2, 3, 4 and 6 and refused on Grounds 1, 5 and 7. The Claimant renews his application for permission to apply for judicial review on Ground 1 and continues to pursue each of Grounds 2, 3, 4 and 6. The grounds of challenge were all directed to the licence signed by the Claimant on 4 December 2019. Since the Secretary of State now accepts there was no legally valid decision taken that day that applied new licence conditions to the Claimant, I will consider each of the grounds by reference to the valid licence, dated 13 December 2019.

(1) Ground 1: only the Parole Board, not the Secretary of State, could vary the Claimant's licence conditions.

21. The Claimant submits that either on the application of ordinary principles of construction or with the assistance of section 3 of the Human Rights Act 1998, the material provisions of the 2003 Act required any decision to vary his licence conditions be taken by the Parole Board. I do not accept either submission.

22. The responsibility for setting the licence conditions is determined by section 250 of the 2003 Act. For this purpose there is no reason to distinguish between a release on licence required by section 247(2) and a release on licence directed by the Parole Board under section 255C(5). Section 250(4) requires every licence to include the standard conditions (section 250(4)(a)) but leaves the decision on other licence conditions to the Secretary of State (see the closing words of section 250(4)(b) "… as the Secretary of State may for the time being specify in the licence."). The Secretary of State's power is restricted by section 250(5A) and (5B), but not in any way that is material to the Claimant's case. Section 250(5B), which prevents the Secretary of State from imposing or varying any licence condition (other than the standard licence conditions) save at the direction of the Parole Board both at the point of the initial release and at the point of any release following recall, only applies to prisoners sentenced under any of sections 226A, 226B and 236A of the 2003 Act. The limitation does not apply to prisoners such as the Claimant, sentenced pursuant to section 227 of the 2003 Act.

23. The distinction drawn between prisoners sentenced under section 227 of the 2003 Act and those sentenced under section 226A is not out of the ordinary. Section 226A was introduced into the 2003 Act with effect from 3 December 2012, by amendment made by the Legal Aid Sentencing and Punishment of Offenders Act 2012. It was a successor provision to section 227 which ceased to have effect on 2 December 2012. Each of section 227 and section 226A provides power to impose an extended sentence if the court assesses that the public is at risk of serious harm from further offending by the defendant. The first versions of the present section 250(5A) and (5B) setting the role of the Parole Board with respect to licence conditions were also introduced by amendment made by the 2012 Act (also with effect from 3 December 2012). The

simple point is that section 250(5A) and (5B) are part of the specific regime that applies to persons sentenced under section 226A. Defendants sentenced under section 227 were not subject to these new provisions; the regime applicable to them so far as concerned setting licence conditions remained as it existed prior to 3 December 2012.

24. Notwithstanding this context, Mr Squires QC for the Claimant submitted that it would make sense for the Parole Board, which by section 225(C) has the power to direct release of a section 227 prisoner, also to have the power to direct the Secretary of State on the licence provisions to apply on such release. There are two answers to this submission. One is that it is not what the words enacted provide: no amount of purposive construction can change that. The other is that I doubt the premise of the submission because it assumes some state of conflict between the Secretary of State and Parole Board such that they could not collaborate to the extent that decisions on release on licence and licence conditions are entwined. I can see no reason why this should be so, and I note that when section 255C was first introduced into the 2003 Act (by amendment made by the Criminal Justice and Immigration Act 2008) it gave the Parole Board the power to direct release when power to decide on release conditions lay with the Secretary of State.

25. The Claimant's submission based on the interpretative power at section 3 of the Human Rights Act 1998 proceeds from the premise that the different allocation of responsibility for setting licence conditions for prisoners sentenced under section 227 and those sentenced under section 226A of the 2003 Act is unlawful discrimination contrary to ECHR article 14 read with article 5. I do not accept this premise.

26. I do not agree that a decision to set licence conditions falls within the ambit of ECHR article 5. The ambit of a Convention right is a matter of assessment. In *M v Secretary of State for Work and Pensions* [2006] 2 AC 91 Lord Nicholls put the issue in terms of whether the disadvantage asserted "comprises one of the ways in which a State gives effect to a Convention right" (see his speech at paragraph 16). Lord Walker stated that "a tenuous connection" with a Convention right is not enough. The core value protected by article 5 is the right not to be arbitrarily detained. The setting of conditions when a prisoner is released on licence is some distance from that core value.

27. Mr Squires QC relied on the decision of the Divisional Court in *R(Akbar) v Secretary of State for Justice* [2020] HRLR 3. There the court considered a challenge to rule 7(1A) of the Prison Rules which prevented the transfer of life prisoners who had served the tariff part of their sentence to open prison conditions if they were subject to a deportation order that was not itself subject to any extant right of appeal. The court concluded that access to rehabilitation opportunities (including a move to open conditions) during the tariff period fell within the ambit of article 5 because of its likely impact on whether a prisoner might meet the conditions for release during the post-tariff period. I do not accept there is any relevant analogy between the situation before the court in *Akbar* and the present case. Setting licence conditions cannot realistically be said to be a way in which effect is given to the prohibition against arbitrary detention. The Claimant's detention following his recall in September 2016 could not be described as arbitrary; it was authorised by the sentence imposed by a court subject to determination either by the Secretary of State or the Parole Board that reasons of public protection did not require imprisonment to continue. Both that criterion and the consideration that the associated purpose of licence conditions is to facilitate the prisoner's transition from custody to freedom so as to maximise the chance of

successful reintegration into society, demonstrate it is artificial to regard the setting of licence conditions as falling within the ambit of article 5.

28. Next, I disagree with the submission that treatment afforded to the Claimant by virtue of his having been sentenced under section 227 of the 2003 Act is treatment on grounds of "other status" for the purposes of the article 14 claim in this case. The Claimant's submission rests on the conclusion reached by the Supreme Court in *R(Stott) v Secretary of State for Justice* [2020] AC 51. In that case a majority in the Supreme Court concluded that Mr Stott, a prisoner sentenced under section 226A of the 2003 Act could, by virtue of that treatment, identify an "other status", relevant to his article 14 claim. Mr Stott sought to compare his position as a prisoner sentenced to an extended determinate sentence with that of a prisoner subject to a standard determinate custodial sentence.

29. However, the judgments in that case provide strong support for the proposition that article 14 "other status" cannot be defined solely by the difference in treatment complained of (see per Baroness Hale at paragraph 210, and Lord Mance at paragraphs 231 and 233). This is important in the context of the present case. The Claimant, a prisoner sentenced under section 227 of the 2003 Act, seeks to compare his position with that of a prisoner sentenced under section 226A of that Act. However, save for the treatment complained of (i.e. the application of section 250(5A) and (5B) to section 226A prisoners but not to section 227 prisoners) the Claimant is in a materially identical position to his comparator. Thus, the reasoning in *Stott* provides the Claimant with no relevant "other status" that can assist him in this case.

30. Further, even if I am wrong on both matters above, the difference of approach to section 226A and 227 prisoners is justified. In *Stott*, the Supreme Court (by a different majority) concluded that short of irrationality, courts ought not be drawn into detailed consideration of lines drawn in different sentencing regimes (see per Lord Carnwath at paragraph 181). That case concerned a comparison between extended determinate sentences and ordinary determinate sentences. The present case is different in that it rests on a comparison of successive regimes for extended sentences. But the same principle applies, particularly since the specific difference in issue, whether licence conditions are decided by the Secretary of State or the Parole Board, is not one that brings with it any clear mark of injustice: either approach is an approach that is permissible consistent with the protection afforded by Convention rights. This difference between one sentencing regime and its successor is readily and sufficiently explained as a legitimate policy choice.

31. Finally on this point, even if my conclusion on the premise of the Claimant's section 3 submission (the existence of a valid article 14 claim) is wrong, section 3 interpretation does not assist. The section 3 power to interpret legislation is strong but not unlimited: the limit is set by consideration of whether the construction required is consistent with the grain or underlying thrust of the legislation. Had the Claimant succeeded on his article 14 claim it would have been on the premise that the difference of treatment afforded to section 227 prisoners when compared to section 226A prisoners was both material and unjustified. On that premise I do not consider that it would be consistent with the grain or thrust of the 2003 Act to erase the Secretary of State's power to set the licence conditions for section 227 prisoners. The way section 250(5A) and (5B) are framed shows a specific decision to retain that power for that class of prisoner; that is characteristic of this legislation and cannot be removed by section 3 interpretation.

32. The coda to Mr Squires' submissions on Ground 1 was that notwithstanding the effect of section 250 of the 2003 Act, as in force at December 2019, the Secretary of State could have, and by reason of Convention rights should have, chosen to defer to the Parole Board when deciding whether to vary the Claimant's conditions. This is a novel submission: a form of mirror image of the defence available to public authorities under section 6(2) of the Human Rights Act 1998. The submission is to the effect that even where section 3 construction cannot provide the outcome a claimant wishes, the public authority comes under some form of legal obligation of self-restraint such that it ought not to exercise the power lawfully available to it. This submission runs against the reasoning in *R(Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681. As explained by Lord Hoffmann at paragraph 51 of his speech, the effect of section 6(2)(b) of the 1998 Act is that "… a public authority is not obliged to subvert the intention of Parliament by treating itself as under a duty to neutralise the effect of … legislation"

33. Although, out of deference to Mr Squires' detailed submissions I have dealt with this ground of challenge at some length, my conclusion is that Andrew Baker J was correct to refuse permission to apply for judicial review on this ground.

(2) Ground 6: was the decision unlawful because the wrong decision-making process was followed?

34. The Claimant submits that, even if under the 2003 Act the power to vary licence conditions applicable to section 227 prisoners rests with the Secretary of State, the decision in December 2019 to add conditions to his licence was unlawful because, in breach of the Secretary of State's policy, the decision was not taken at the request of his Offender Manager[2]. This submission rests on two matters: first, requirements said to arise from document PI 09/2015 "Licence Conditions and Temporary Travel Abroad" issued by the Probation Service; and second the public law duty of adherence to published policy (see for example, *R(Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 per Lord Dyson at paragraph 34).

35. I do not accept this submission. So far as concerns the Claimant, decisions on licence conditions are, by virtue of section 250 of the 2003 Act, decisions for the Secretary of the State. Nothing in PI 09/2015 alters that as a matter of law. In very broad summary the material provisions of PI 09/2015 are to the following effect. *First* that all licences must contain the standard conditions. In this respect the document restates and explains what is already required by section 250(4) of the 2003 Act and articles 3 to 6 of the 2015 Order. *Second* the document considers additional licence conditions (i.e. conditions concerning the matters listed at article 7 of the 2015 Order). It explains that if an offender's Offender Manager considers that standard conditions are not sufficient she may request one or more additional conditions be applied. Annexes A and B to PI 09/2015 provide specimen additional conditions. The Offender Manager can request that conditions listed in Annex A be applied to any type of offender. The conditions at Annex B are intended to be applied only to offenders convicted of extremist or terrorism related offences. PI 09/2015 anticipates that an Offender Manager will decide whether any such condition should be applied either on her own initiative, or following

[2] As pleaded, this ground of challenge contained a further element that the decision had been taken pursuant to a "unpublished policy". At the hearing, Mr Squires confirmed this complaint was no longer pursued.

recommendation by a (MAPPA meeting), and having done that, will seek permission from the "responsible authority" to add the condition to the licence. "Responsible Authority" is defined at section 325 of the 2003 Act to mean the Chief Officer of Police and Probation Board for the area concerned together with the Secretary of State. *Third*, PI 09/2015 deals with "bespoke conditions". Paragraphs 2.23 and 2.25 provide as follows.

> "2.23 If standard or additional licence conditions set out Annex A or B are not judged to be sufficient to manage specific risk factors, consideration must be given as to whether, exceptionally, an application needs to be made for a "bespoke" condition. If so a formal application must be made by the supervising officer to PPCS.
>
> …
>
> 2.25 Any bespoke condition which seeks to impose something different from the menu of additional conditions must:
>
> > (i) fall within one of the requirements listed in paragraph 2.7; and,
> >
> > (ii) not be applied to a licence without seeking agreement to this "bespoke" condition from PPCS."

PPCS refers to the Public Protection Casework Section, part of the Probation Service, based in London at the Ministry of Justice.

36. To the extent that PI 09/2015 identifies a decision-making process and provides that certain decisions require a particular level of authority it is, in legal terms, no more than a worked example of the application of the *Carltona* principle (see *Carltona Limited v Commissioners of Works* [1943] 2 All ER 560 per Lord Greene MR at page 563A-D). In practice, it will make sense (perhaps in an overwhelming majority of cases) for the decision-making process on a change to licence conditions to be initiated and led by the Offender Manager, the person with greatest first-hand experience and knowledge of the offender. But that is the full extent of the significance of these parts of PI 09/2015. I do not consider they can fairly be interpreted as requiring this bottom-up approach as a matter of legal requirement in every case, regardless of circumstances. If in a particular case a different decision-making process is followed, that may (perhaps) be material to the quality (i.e., the practical merit) of the decision. For example, it is possible to imagine a situation in which a decision initiated by a person some distance removed from regular contact with the offender might run the risk of being made without consideration of some material matter.

37. But that is not the Claimant's submission. His submission is that if the decision to add the licence conditions in December 2019 was not initiated by Ms Dixon, his Offender Manager, it was for that reason alone legally invalid. That submission is wrong. It rests on an over-reading of PI 09/2015 and a misapprehension of the legal significance of the parts of PI 09/2015 which describe decision-making processes. These passages are not the functional equivalent of the parts of the policy considered by the Supreme

Court in *Lumba* which set out the circumstances in which the Home Secretary would exercise her power of detention under the Immigration Act 1971.

38. The Secretary of State, at least in the pre-action correspondence, went to some lengths to suggest that in December 2019 Ms Dixon did initiate the changes to the licence conditions. This was neither necessary to demonstrate the legality of the decision taken, nor entirely plausible given the sequence of events between 29 November 2019 and 13 December 2019 (when the legally effective decision was taken).

39. I have already set out that basic sequence of events. It is clear that the process of considering and applying additional licence conditions to TACT offenders in the aftermath of the events at Fishmongers' Hall was promoted and coordinated by Mr Reid and others at Probation Service headquarters. Those events raised generic concerns relevant to all TACT offenders on licence. Those matters needed to be considered thoroughly and at speed. As Mr Reid explained, the fear was that others who had followed the same process of rehabilitation as Khan might equally remain predisposed to violent extremist action. The position of the Claimant may have been thought particularly acute: he had been one of Khan's co-defendants. Nevertheless, the reason for reconsidering the sufficiency of his licence conditions was that he was one of the class of TACT offenders. I accept Mr Reid's evidence that as National Security Head within the Probation Service he wanted to guide a consistent approach for decision-making across each of the regional offices (including the Cardiff office) that had responsibility for one or more TACT offenders. This explains the pro-forma question sheets issued to each office, and the "script" document which included fully-formed versions of new licence conditions. It also provides the context for Ms Remigio's description (prior to the script document) that the conditions were "requested by the Secretary of State". But although the process was thus initiated and promoted by Mr Reid, it was then taken on (in the case of the Claimant) by the Cardiff Office. It would be artificial to describe Ms Dixon the Offender Manager as having requested the new licence conditions. She did not do so as a matter of form: she completed neither the first (unsent) licence variation request form which was completed by Ms Remigio on 30 November 2019, nor the second version completed by Ms Williams on 12 December 2019. Ms Williams completed that form but then inserted Ms Dixon's name as the "name of person completing the form". This is inexplicable but not, so far as I am concerned, a matter that goes to any issue of legality. However, before the decision was taken to request the additional licence conditions, full consideration had been given to the Claimant's case at the 4 December 2019 MAPPA meeting. Ms Dixon attended and participated in that meeting, as did Ms Packham and Ms Williams.

40. Drawing matters together, although the decision-making process may not have followed the template suggested in PI 09/2015, those parts of that document do not prescribe any process that goes to the legality of the decision taken. Moreover, taking into consideration the specific circumstances arising in the aftermath of the Fishmongers' Hall attack, the process that was followed was no more than a sensible and entirely permissible adaptation of the model set out in PI 09/2015. I cannot accept that the law requires the position that is implicit in the Claimant's submission: that in such circumstances Ms Dixon, likely to be one of the most junior members of the Probation Service involved in the process, had to have placed on her the responsibility for devising the response required. Quite apart from anything else, any such

requirement would run squarely against the central role fulfilled by MAPPA in the process of identifying and managing risk presented by TACT offenders.

(3) Ground 2: failure to allow the Claimant the opportunity to make representations.

41. The sequence of the events at the Cardiff office from 30 November 2019 to 13 December 2019 displays a lack of method in that office's dealings with the Claimant. I have already explained the misunderstanding which resulted in the Claimant being told on 4 December 2019 that new licence conditions had been imposed on him when in fact no legally effective decision was made until 13 December 2019. Neither this error nor the way it was remedied was mentioned to the Claimant at the time. Added to this, the opportunity was not taken to discuss the proposal to impose new licence conditions with the Claimant. There was a phone conversation with him on 4 December 2019, and then a meeting with him later the same day. But both were conducted on the basis that following the MAPPA meeting that had taken place earlier the same day the decision to add the new licence conditions had already been made. Thus, the focus of both the phone call and the meeting was only to explain to the Claimant the effect of the new licence conditions, not to ask him whether he had anything to say that might be material to the decision-making process. The same can be said of the contact after 4 December 2019 up to 13 December 2019, no doubt because Ms Dixon remained under the impression that by 4 December 2019 a legally-effective decision to add the new licence conditions had been taken.

42. The Claimant submits that the failure to give him an opportunity to make representations was contrary to common law and/or in breach of a procedural obligation that arose under ECHR article 8 because each of the new conditions and the decision to implement the electronic tag condition (that had always been in his licence conditions) was an interference with his article 8(1) rights. The Secretary of State accepts the common law principle applies but disputes whether the new measures, even taken together, gave rise to any material interference with article 8 rights. It is not necessary for me to resolve the dispute on the application of article 8(1). The common law obligation of fairness applies; were article 8(1) to be engaged the procedural obligation that would arise would go no further than anything that may be required at common law.

43. The Claimant relies on the decision in *Bank Mellat v HM Treasury (No. 2)* [2014] AC 700 to identify the scope of the right to make representations. At paragraph 179 of his judgment in that case Lord Neuberger stated.

> "179. In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity. I would add that any argument advanced in support of impossibility, impracticality or pointlessness should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity,

> when such an obligation is not dispensed with in the relevant statute."

All members of the court accepted this principle, although the court divided on its application to the situation before them. One matter weighing in the minds of the majority in support of their conclusion that the bank should have had an opportunity to make representations, was that the substantive decision on that occasion rested on specific factual allegations that were plainly capable of being refuted by the bank (see per Lord Sumption at paragraph 32). In other words, the requirements of fairness are sensitive to context: the nature of the substantive decision can shape what amounts to an appropriate opportunity to make representations.

44. This is also clear from the judgments in *R(Tabbakh) v Staffordshire and West Midlands Probation Trust* [2014] 1 WLR 1022 and *R(Gul) v Secretary of State for Justice* [2014] EWHC 373 (Admin). Each judgment recognises that the scope for making representations will be more limited where the matter that governs the substantive decision is an assessment of risk rather than a determination of fact. The decision in issue in this case depended on assessment of risk. Although the general principle to permit some opportunity to make representations applied, the process required did not have to be elaborate. The Secretary of State submits that Ms Dixon's own involvement in the MAPPA process was good enough. I do not agree. Had she spoken to the Claimant to seek his views prior to that meeting and then reported those matters as part of her contribution to the MAPPA meeting, that would have been sufficient. But that did not happen. She did not speak to the Claimant about the conditions until after the 4 December 2019 MAPPA meeting.

45. A compelling need for urgency can also affect how requirements of fairness are to be met. However, on the facts this was not such a situation. The MAPPA meeting was on Wednesday 4 December; the likely form of the new licence conditions was certainly apparent by Monday 2 December 2019. There was time to speak to the Claimant. The Secretary of State did not suggest that in this case there was any positive reason not to speak to him.

46. The position is not remedied by the fact that even though all concerned in the Cardiff Office believed that a decision had been made on 4 December 2019 it has transpired that the legally effective decision did not occur until 13 December 2019. Between 4 December 2019 and 13 December 2019 there was contact between the Claimant, Ms Dixon and Ms Packham. However, that contact extended no further than attempts to explain what the new conditions meant and to answer questions from the Claimant about their practical effect. There was no sense in which the decision, regarded as final following consideration at the 4 December 2019 MAPPA meeting, was under review. Even when it became apparent that the request to the PPCS to approve the new licence conditions had not been sent, there was no attempt to re-open and reconsider the matter. All that happened was that Ms Williams filled out a new request form in Ms Dixon's name and submitted to the PPCS. That form stated, somewhat ambiguously, "the licence variation has been discussed in full with [the Claimant]". The licence conditions had been discussed with the Claimant but only on the basis that a decision to make them had already been taken, not on the basis that his views on a proposed decision were being sought. I accept that this ambiguity reflects no more than a level of disorganisation within the Cardiff office. But it is significant in the context of this

ground of challenge. There was a failure to allow the Claimant an opportunity to make representations.

47. Although this ground of challenge succeeds, it is not necessary to quash the decision to add new licence conditions. Declaratory relief is sufficient. The Claimant was given no sufficient opportunity to make representations prior to the MAPPA meeting on 4 December 2019 or for that matter prior to 13 December 2019 when the new licence conditions applied to him. However, later and with the assistance of his solicitors, representations were made: see the letter dated 15 January 2020. Those matters were considered at a MAPPA meeting the next day. I am satisfied that at that meeting the new licence conditions were reviewed taking the Claimant's representations into account. The Claimant was sufficiently involved in the decision-making process at that point. This overtook the error that had occurred at the beginning of December 2019. In the premises, declaratory relief will be sufficient to address what went wrong.

(4) Ground 4: certainty. Ground 3: proportionality

48. The Claimant's submission on certainty is directed to licence condition xvi in the 13 December 2019 version of the licence. Mr Squires QC submits that in the context of a decision such as this, concerning the conditions applicable when a person is released on licence when he will be liable to be recalled in the event of breach, a condition that lacks certainty will be legally invalid. Thus, his submission on certainty is not so much part of his overall article 8 case rather, it is a freestanding common law ground of challenge. I agree with this analysis and accept that the quality of certainty does in this case go to the legality of the decision to impose new licence conditions.

49. Condition xvi in the 13 December 2019 licence is as follows.

> "Not to attend or organise any meetings or gatherings of more than 50 people without prior permission of the NPS Divisional Head of Public Protection or LDU Head. This condition will be reviewed by your [Offender Manager]" on a WEEKLY basis and may be amended or removed if it is felt that the level of risk you present has reduced appropriately."

Mr Squires submits that the notion of "meetings or gatherings" lacks the certainty that is reasonably required. He also submits that the effect of this condition has never been clearly explained to the Claimant.

50. I accept that the Claimant's Offender Manager did not provide coherent information about the effect of this condition. In part this stemmed from the successive variations of new conditions in the (legally ineffective) 4 December 2019 licence and the (effective) 13 December 2019 licence.

51. The 4 December 2019 version of the licence had contained the following:

> "xix Not to attend or organise any meetings of more than 50 people and not to enter any area or place listed in the attached document, without permission of the NPS LDU Head.
>
> …

xxi Not to enter regionally identified crowded places."

Condition xxi as stated, was too vague because the Cardiff office did not identify any such places. Condition xix was problematic to the extent that the list referred to was not provided to the Claimant (and from the evidence I have seen, may not have existed at all). The information that was given to the Claimant indicates that his Offender Manager and others in the Cardiff office lacked any clear understanding of what these conditions meant. One issue that ran throughout December 2019 was whether the conditions in the 4 December 2019 licence prevented the Claimant going to a supermarket. The Defendant's Delius notes for the period include advice:

> "supermarkets are fine as long as outside of town. Gill advised [the Claimant] just to stay out of [the] city centre for now"
>
> (4 December 2019)
>
> "[the Claimant] was verbally told that he should be able to attend … supermarkets… not in the city centre..."
>
> (5 December 2019)
>
> "general advice is to stay away from [the] City Centre, however… supermarkets [outside of the city centre] are OK"
>
> (11 December 2019)
>
> "I have verbally informed [the Claimant] he can attend supermarkets outside of the city centre"
>
> (13 December 2019)

Each piece of advice appears to be based on an elision of conditions xix and xxi or some form of understanding of condition xxi alone. I can only assume the advice not to go to the city centre rested on the view that this counted as a "regionally identified crowded place". Logically, the advice given could not have been on the basis that going to the supermarket was itself a breach of condition xix since if that were so, where the supermarket was would have been irrelevant.

52. There is no evidence that the advice given to the Claimant changed after the operative condition changed to condition xvi in the 13 December 2019 licence. In fact, the evidence is quite to the contrary. As late as February 2020 the Claimant's Offender Manager remained under the impression that licence condition xvi continued to prevent him from entering the city centre even though what had been condition xxi in the 4 December 2019 had been dropped from the 13 December 2019 version of the licence. This is a very sorry state of affairs indeed. The contemporaneous Delius notes suggest that the Claimant was confused about what he could and could not do, and was frustrated by the situation. His confusion and frustration are entirely understandable. The Cardiff office substantially failed in its task of explaining the new conditions. In this respect it failed the Claimant. However, that failure was at a practical level. I do not consider that it goes to the legality of the licence conditions.

53. The Claimant correctly recognises that the only focus for the certainty ground of challenge is condition xvi in the 13 December 2019 licence. Nothing in the 4 December 2019 licence is material because no valid decision was taken to make a licence in that form. Mr Squires' submission is that the notion of a "gathering" is too vague and extends to cover the Claimant's presence in crowded places such as high streets and shops. He also submits that it would prevent the Claimant from attending his local mosque. This latter point is comprehensively addressed by licence condition xxiii in the 13 December 2019 licence: this expressly permits the Claimant to attend his local mosque. Conditions in a licence must be considered as a whole. There is no reasonable reading of condition xvi that puts in doubt what is permitted by condition xxiii.

54. I do not accept the more general submission about crowded high streets and shops because what counts as a gathering takes its meaning from the entirety of the condition xvi. The prohibition is "[not]… to attend or organise any meetings or gatherings …". In context, "gathering" is not apt to refer either to the people in a street or to those who happen to be in any single shop at any particular moment in time. The notion of organising or attending a gathering brings with it a quality of formality: in context, the word gathering exists to make clear that condition xvi is directed to organised forms of association. The operative qualities are organisation and association. Reasonably understood, condition xvi neither prevents the Claimant going to a shop nor prevents him from walking through a busy street or shopping centre. Reasonably understood, condition xvi is sufficiently certain. Part of the advice given by the Claimant's Offender Manager was to stay away from "ticketed events". That properly identifies one way in which way condition xvi will operate. For example, going to a football match would not as a matter of ordinary language be described as attending a meeting but would be readily recognisable as attending an organised gathering. Other advice which was either less clear or even wrong-headed does not set the benchmark for whether as matter of law condition xvi meets the legal requirements for certainty. I am satisfied that condition xvi does meet that standard.

55. The Claimant's submission on proportionality is also directed to condition xvi in the 13 December 2019 licence[3]. I will assume that the existence of condition xvi is sufficient to comprise an interference with the Claimant's Convention rights. Mr Squires criticises the continued application of condition xvi. He submits that regardless of what the position may have been as at December 2019, it is disproportionate now to continue to apply the condition. Mr Squires relies in particular on the Extremism Risk Guidance 22+ ("ERG 22+") assessment undertaken on 31 August 2020 and the Appendix to that report which is to the effect that the risk the Claimant will re-engage with extremist activity is low. He also relies on decisions made by the Parole Board in respect of other TACT offenders whose cases were reviewed following the murders at Fishmongers' Hall. These offenders had been sentenced under section 226A of the 2003 Act, so whether their licence conditions should be varied fell to be decided by Parole Board and not by the Secretary of State. Mr Squires points to a number of such determinations

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[3] No point is taken on condition xvii which continues to operate to prevent the Claimant from entering any of the City of London, the City of Westminster and the London Borough of Southwark without permission. This condition has no direct impact upon the Claimant's day to day activities. The Claimant does not pursue the ground of challenge so far as concerns the decision in December 2019 to require the him to wear an electronic tag as that requirement was removed with effect from September 2020.

each of which concluded that conditions identical to condition xvi did not need to be applied.

56. I do not accept this submission that the continued application of condition xvi is disproportionate. As a starting point it is relevant to note that the condition contains a significant element of flexibility. The Claimant can request permission to attend or organise any meeting or gathering which would otherwise fall within the scope of the prohibition. The condition must also be reviewed weekly by the Offender Manager and on such review may be amended or removed. Although those reviews have not to date resulted in withdrawal or amendment, the existence of this feature is significant because it commits the Secretary State to on-going reconsideration.

57. So far as concerns the ERG 22+ assessment two matters are material. *First*, that the assessment was undertaken on the basis that the Claimant was subject to the licence that now applies to him, including condition xvi. *Second*, the writer of the report was at pains to make clear that the assessment should not be relied on in isolation to determine what licence regime should continue to apply, but only be used as part of a full MAPPA evaluation.

58. The next point is that there has been MAPPA consideration of the Claimant's case since the ERG 22+ assessment on 4 September 2020. The note of that meeting recorded that the ERG 22+ assessment showed "some risks are partially present and some have reduced". The meeting concluded that although the requirement that the Claimant wear the electronic tag could be removed, work remained to be done and the other conditions imposed in December 2019 should remain in place. The MAPPA process is based on expert assessment. Those assessments entail matters of fine judgment. They ought not lightly to be second-guessed by a court, and I can see no reason to do so here.

59. Essentially the same point addresses the Claimant's further submission based on Parole Board decisions in other cases. No proportionality analysis in a case such as this ought to engage in detailed consideration of decisions taken on different facts. Even assuming that the context of any other case is materially the same, a decision of the Parole Board in that case not to impose a condition like licence condition xvi would no more demonstrate that the Secretary of State had acted unlawfully in this case, than his decision in this case would show that in the other case the Parole Board had reached an unlawful conclusion. Proportionality testing is not an exercise in moderating such decisions. Each decision must be judged on its own terms. There is nothing in the Parole Board decisions that warrants let alone compels the conclusion that the decision that condition xvi should continue to apply to the Claimant is unlawful.

D. Disposal

60. If my Lord the Lord Chief Justice agrees, I would refuse the renewed application for permission to apply for judicial review on Ground 1, and refuse the application for judicial review on all other grounds save for Ground 2. I would allow the application for judicial review on Ground 2, but grant only declaratory relief to the effect that in the circumstances of this case the Claimant should, prior to 13 December 2019, have been afforded an opportunity to comment on the proposals to impose the additional conditions (i.e., conditions xvi and xvii in the licence made on 13 December 2019) and to activate the requirement in condition xix to require him to wear an electronic tag.

LORD BURNETT OF MALDON CJ

61. I agree.